No. 72-793

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

HOUSING AUTHORITY OF THE CITY OF OMAHA, NEBRASKA, et al.,

Petitioners,

v.

UNITED STATES HOUSING AUTHORITY, et al., and

NATIONAL TENANTS ORGANIZATION, et al.,

Respondents.

THE RESPONDENTS' BRIEFS IN OPPOSITION TO THE PETITION FOR CERTIORARI SHOW WHY THE WRIT SHOULD ISSUE

1. Federal Respondents Now Concede That The Court Below Fundamentally Misapprehended What The HUD Circulars Require.

The Court of Appeals below grossly misinterpreted the nature of the HUD Circulars at issue when it held that Circular 9's grievance procedures do "*not* basically alter the lease • • • these grievance procedures may be invoked *only* when the Local Authority is alleged to have violated the actual terms of the lease" (A-29, emphasis added).* Neither set of respondents has challenged the accuracy of petitioners' showing of how the Court of Appeals' descrip-

---

* That both of these statements are unfounded was pointed out below by petitioners (A-43-5).

tion of the Circulars clashes with reality. But federal respondents go further; they now specifically underscore the fundamental misapprehensions of the court below when they concede (p. 4) both that every lease must be altered to provide, among other things, that "all grievances are to be processed according to the management grievance procedure" and that that procedure applies to "*any* dispute concerning • • • *any* housing authority regulations, policy or procedures" claimed to affect adversely any tenant (emphasis added).

The candor of the federal respondents as to what the Circulars require is less evident when they discuss other aspects of the HUD imposed grievance procedure. Thus they say: "both sides may obtain judicial relief from a decision adverse to the tenant" (p. 4). In other words, a LHA "may obtain judicial relief" from a decision favorable to it! The fact of the matter, as we stated in our Petition (pps. 6, 16), is that under the Circulars "two proceedings would be required before any LHA could obtain relief against any tenant whatever the nature of the dispute • • • the Circulars require two hearings to collect for a broken window or enforce a pet regulation".

Petitioners suggest that federal respondents' tacit concessions that the Court of Appeals did not comprehend the effect of the Circulars before it, and all respondents' failure to challenge petititoners' accurate description of the sweeping effect of the Circulars, are reasons enough for our Petition to be granted.

2. Respondents' Briefs Assist In Demonstrating That The Opinion Of The Court Below Writes The 1959 "Local Autonomy Amendment" Out Of The Act.

The federal respondents do concede in a footnote (p. 6) the existence of the 1959 "local autonomy amendment" which this Court summarized in *Thorpe* as the "congres-

sional policy of allowing [LHA's] to retain maximum control over the *administration* of federally financed housing projects" (393 U.S. at 278, emphasis added). In another footnote (p. 8) federal respondents also concede that the Act defines "administration". But federal respondents fail to quote precisely the Act which provides: "The term 'administration' means *any or all* undertakings necessary for management, operation, maintenance * * * in connection with a low rent housing * * * project (42 U.S.C. § 1402(6), emphasis added). Federal respondents omit the phrase "any or all" from their quotation of the Act's definition.

What is clear, and conceded, at least by federal respondents, is that HUD Circulars 8 and 9 must be measured against a congressional policy that LHA's are to retain "maximum control" over "any or all undertakings necessary for [the] management [and] operation" of federally financed housing projects.

But neither set of respondents will admit that the 1959 "local autonomy amendment" imposes any limitation upon the power of HUD to make rules. Thus, federal respondents argue that HUD may issue whatever rules it pleases if intended to "eliminate landlord-tenant hostility and antagonism" with a view to improving "the quality of the living environment" (pps. 9, 10); NTO respondents describe HUD's power in almost identical terms (p. 9).

The briefs of both sets of respondents show that they stand fast with the Court of Appeals in rejecting the policy of the United States Congress, properly applied by the District Court,* that progress toward the broad goals of the

---

* Both federal respondents (p. 10) and NTO respondents (p. 12) suggest that the District Court's opinion invalidating the Circulars is contrary to other decisions. But the opinions cited by the respondents almost all arose in an eviction dispute context and HUD was not a party to any of those cases, a critical factor noted by this Court in *Thorpe*.

Housing Act was to be accomplished by means which leave maximum responsibility for the administration of housing projects at the local level; HUD's powers have been circumscribed by Congress and HUD has not been left free, as held by the court below and insisted upon by respondents, to issue any and all rules it believes might improve the quality of life in public housing projects.

Federal respondents join with the court below in claiming (p. 9) the "local autonomy amendment" "does not restrict HUD's responsibility and concomitant authority to protect and further the purposes and objectives of the Act as expressly evidenced by Section 1408". But all that section (42 U.S.C. § 1408) evidences is that HUD has the power to make rules "as may be necessary to carry out the provisions" of the Act. Thus the federal respondents take the position that a boiler plate grant of authority to an agency to make rules in accord with the provisions of the applicable Act may be relied on as authority to set aside a provision of the Act, in this case the 1959 "local autonomy amendment". At best, that is an untenable position.

3. What Respondents Say And Fail To Say About This Court's Opinion In Thorpe v. Housing Authority, 393 U.S. 268 (1969), Assists In Laying Bare The Fundamental Error Of The Court Below.

Petitioners have pointed out (pps. 12-16) that the *reasoning* and the principles set forth by this Court in *Thorpe* were not followed by the court below. Respondents' challenge to this argument reduces to the dogmatic claim that petitioners have got to be wrong. Beyond that, what they say makes no sense.

Thus, NTO respondents argue that, since this Court in *Thorpe* sustained the validity of the HUD Circular then

before it, this apparently requires that all other HUD Circulars must also be held valid (p. 10). The federal respondents struggle with *Thorpe* in a footnote (p. 10) stating that what this Court said "was certainly not intended to limit HUD's authority to issue appropriate regulations". This formulation of *Thorpe* simply begs the question of what constitutes an "appropriate regulation". In *Thorpe* this Court tested a HUD regulation to determine whether it was appropriate in light of the congressional policy to vest maximum responsibility for administration in local housing authorities and that particular HUD regulation passed. As we point out in our Petition (pps. 12-16), so tested, HUD Circulars 8 and 9 can not be sustained.

As we pointed out in our petition (p. 15), *Thorpe* anticipated the contract impairment issue raised in this case by HUD's threats and arguments that it can repudiate its obligations under the annual contributions contract if an LHA fails to apply the Circulars. In their brief in opposition, federal respondents now claim the right to add to the obligations of annual contribution contracts since those contracts contain nothing "precluding such additional requirements" (pps. 11, 12). Thus federal respondents endorse a new principle of contract law presumably applicable only to HUD: HUD may amend contracts it has entered into at its pleasure so long as the existing contract does not "preclude" HUD from changing it. This notion is, of course, untenable. As this Court pointed out some years ago and reaffirmed in *Thorpe*: "'[v]alid contracts are property, whether the obligor be a private individual, a municipality, a State or the United States. Rights against the United States arising out of a contract with it are protected by the Fifth Amendment.' *Lynch* v. *United States*, 292 U.S. 571, 579 (1934)." (393 U.S. at 278 n. 31.) In *Lynch* this Court went on to state: "When the United States

enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals." (292 U.S. at 579.) What's true of the United States is, of course, true for HUD.

4. Respondents' Arguments On The Administrative Procedure Act Issue Also Underscore The Reasons Why The Writ Of Certiorari Should Be Granted.

The Court of Appeals held (A-35) that whenever an agency distributes federal moneys there is established a "governmental 'proprietary interest'" so that it may regulate the recipients of such moneys without any regard to the procedural safeguards established by the Administrative Procedure Act. Petitioners have pointed out (p. 17) the absurdity of the notion that the administration of federally financed housing projects is a matter where the government's interest is "proprietary" and respondents have said nothing in opposition. Clearly, if HUD, or any other agency in such areas as Defense or Health, Education and Welfare, has unbridled discretion whether or not to follow the Administrative Procedure Act, that Act is effectively emasculated, and such will be the effect if the decision of the Court of Appeals is permitted to stand. Laws, such as the Administrative Procedure Act, intended to limit the power of the bureaucracy are meaningless if the bureaucracy has unbridled discretion to determine for itself whether and when it elects to be bound by the law.

Both briefs in opposition appear to concede, along with the court below (A-35), that one test of whether the exception to Section 4 of the Administrative Procedure Act relating to "public contracts" applies is that the rule and the public contract must be *directly* related. Both briefs go on to insist, as did the Court of Appeals, that language from this Court's decision in *Thorpe* v. *Housing Authority of*

Dunham, 393 U.S. 268 (1969), establishes the requisite *direct* relationship between the regulations and HUD contracts with LHA's. In point of fact, however, the *Thorpe* decision holds exactly the opposite.

In *Thorpe,* dealing with a HUD regulation having a *de minimus* effect upon an LHA's power to administer its projects and finding that it was not in derogation of the LHA's contract rights, this Court stated (393 U.S. at 279), "Although the Circular supplements the contract in the sense that it imposes upon the Authority an additional obligation not contained in the contract, that obligation is imposed under HUD's *wholly independent* rule making power" (emphasis added). In other words, HUD circulars are not related to HUD contracts. Respondents and the Court of Appeals wrench this language from a context having nothing to do with the Administrative Procedure Act to support the view that the Circulars "directly supplement" the annual contributions contract (A-36), hence the test that the Circulars must be "*directly* involved" (emphasis in original) with a public contract (A-35) is met, and thus HUD need not comply with Section 4 of the Administrative Procedure Act.

We suggest that an opinion or an argument which so misconstrues this Court's actual words is charitably described as dubious. In any event, at the very least, the writ of certiorari should be granted to determine whether, on the Administrative Procedure Act issue, the decision of the Court of Appeals below "has decided a federal question in a way in conflict with applicable decisions of this Court" (Sup. Ct. R. 19(1)(b)).

Obviously troubled by the lack of merit in their arguments, both groups of respondents argue that the Administrative Procedure Act issue is unimportant because on March 4, 1971 (a scant ten days after promulgation of the

challenged Circulars) HUD announced that *henceforth* it would follow the requirements of Section 4 of the Administrative Procedure Act with respect to rules and regulations issued by it. This, we suggest, constitutes a tacit admission by HUD that its procedures in issuing the challenged Circulars were illegal; but this retrospective act of penance in no way deprives the decision below of its significance or of the importance for this Court to review that decision. The prospective procedural change by HUD in no way cures the invalidity of the procedure whereby Circulars 8 and 9 were promulgated.

5. Federal Respondents Have Misconstrued The Record In The Lower Courts.

The court below held that: "Since there exists no threatened loss of funds for failure to comply with Circulars 8 and 9, the issue of contract impairment at this time is purely hypothetical" (A-37) despite the fact that HUD had formally announced that the withholding of funds was a means it would utilize to enforce the Circulars (A-37) and evidence that in December 1971, all LHA's in Kentucky received a written direct threat from HUD that modernization funds will not be allocated to any LHA that has not adopted the Circulars, and where such funds have been allocated, HUD will not approve expenditure until they are adopted (A-52).

Apparently unwilling to contest the reality of the threats, federal respondents transform the real issue, whether there is a threat to withhold funds, to the imaginary issue of whether a "recommendation for withholding funds has ever been made" (p. 12). This view is as surprising as would be the argument that a kidnapping is not complete until there has been a recommendation that the ransom be paid.

Federal respondents state (p. 13) that in the Court of Appeals petitioners did not make any "due process argu-

ments with respect to either the promulgation of the Circulars or the delegation of authority to the hearing panels", and the court below said "nothing about these issues because petitioners failed to raise them". These statements are strange indeed when it is remembered that petitioners were appellees in the court below and not appellants. Those issues, although raised in the complaint,* were not reached by the District Court and did not come to the fore in the Court of Appeals until release of its opinion at which point they were promptly brought to the attention of that court in the petition for rehearing (A. 48, 54). The importance of thoughtful consideration of due process issues in rule making is underscored by the discussion in both the majority and minority opinions in this Court's recent decision in *U.S.* v. *Florida East Coast Railway Company et. al,*— U.S.—(January 23, 1973).

CONCLUSION

For all of the above reasons, and those set forth in the Petition, a writ of certiorari should issue to review the judgment and opinion of the Eighth Circuit.

Respectfully submitted,

PATRICK W. O'BRIEN
GEORGE V. BOBRINSKOY
DOUGLAS A. POE
Room 1955
231 South LaSalle Street
Chicago, Illinois 60604

EVERETT L. HOLLIS
J. STANLEY STROUD
1101 Seventeenth Street, N.W.
Washington, D. C. 20036

Counsel for Petitioners, all of The Local Housing Authorities in the United States

Of Counsel:
MAYER, BROWN & PLATT
Chicago, Illinois and
Washington, D. C.

KENNEDY, HOLLAND,
DELACY, SVOBODA
Omaha, Nebraska

* Par. XIII alleges: "The rules and regulations contained in [the] Circulars . . . were issued in violation of the requirements of due process of law."